A **ABDUL KASHAB HJ HANAFI v. HONG LEONG BANK BHD**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[CIVIL APPEAL NO: 12ANCC-73-08-2015]
3 JUNE 2016

B

HIRE PURCHASE: *Breach of agreement – Default in payment – Repossession of vehicle – Hirer voluntarily returned car to bank prior to repossession by bank – Valuation on estimated value of car – Car eventually auctioned and sold at lower price – Demand for shortfall payment – Summary judgment application allowed by*
C *Sessions Court – Appeal against – Whether bank failed to sell car at higher price – Whether there was tampering during inspection and valuation of car – Whether demand by bank as provided in certificate of indebtedness valid – Whether hirer duly served with requisite notices – Whether triable issues arose – Whether Sessions Court Judge rightly granted summary judgment*

D

Pursuant to a hire purchase agreement entered into by the respondent and the appellant dated 24 June 2009 ('HP agreement'), the appellant agreed to hire a Mercedes Benz ('the car') at a price of RM764,025. As the appellant defaulted in making payments, the respondent sent a notice of intention to repossess the car under the Fourth Schedule to the Hire-Purchase Act 1967
E ('the HP Act') dated 24 April 2014, and subsequently issued another notice dated 10 May 2014 pursuant to reg. 15 of the Hire-Purchase (Application of Permit and Procedure of Repossession) Regulations 2011. The appellant, however, voluntarily returned the car to the respondent on 6 May 2014. The car was immediately examined by a representative of G-Mart Corporation
F Sdn Bhd ('G-Mart') for the respondent upon its return. As such, on 7 May 2014, the respondent issued a notice under the Fifth Schedule of the HP Act ('Fifth Schedule Notice dated 7 May 2014') providing the respondent's estimate value of the car. The car was eventually sold by public auction on 22 August 2014 at a sale price of RM141,000. Given the failure of the
G appellant to make payment of the outstanding sum of RM150,307.56, the respondent after taking account the proceeds of the sale of the car, filed an action against the appellant at the Sessions Court. The Sessions Court allowed the respondent's summary judgment application. Hence, the appellant appealed against the summary judgment granted on the grounds that (i) the appellant was not served with or notified of the vesting order vesting
H all assets and liabilities of EON Bank Berhad inclusive of the HP agreement to the respondent, and that the HP agreement itself was not given to the appellant; (ii) the respondent failed to comply with s. 16 of the HP Act and the notices said to have been issued were thus not valid; (iii) the respondent failed to sell the car at a higher price; (iv) the respondent's demand was the
I certificate of indebtedness was invalid; (v) the affidavit in support ('CKH-12') of the summary judgment application was defective; and (vi) the veracity of the inspection and valuation of the car issued by G-Mart exhibited in CKH-12 did not to reflect the true conditions of the car and was tampered with.

Held (dismissing appeal with costs):

(1) Although the Fifth Schedule Notice dated 7 May 2014 estimated the market value of the car to be RM198,400, the lower actual sale price of RM141,000 was not improper or unreasonable. The sale was done at a public auction where demand is generally not strong and prices usually fall in subsequent auctions. The estimate in the Fifth Schedule Notice is plainly an estimate. (para 11)

(2) The respondent (*via* G-Mart) performed the requisite inspection and valuation on the very day the car was returned and one day before the issuance of the Fifth Schedule Notice. The inspection and valuation of vehicle form in CKH-12 had taken into account various aspects such as scratches. The allegations of vehicle tampering and the allegations that the inspection was not properly conducted and that there were no defects at the time the car was surrendered were without substance. (paras 12 & 14)

(3) The appellant's contention that the form in CKH-12 was not signed by the appellant as acknowledgment was without any merit. The form had nothing to do with the appellant. This was not a repossession form that would require the signature of the hirer. The car was returned, not repossessed, and in any event, this CKH-12 form evidences inspection and valuation, not on the fact of the return of the car *per se*. (para 15)

(4) The allegation that the appellant was kept in the dark about the intended auctions was untenable. The respondent had produced evidence to show that the Fifth Schedule Notice was sent on 7 May 2014 by registered post pursuant to s. 16(3) of the HP Act and the notice informing of the auction sale was sent *vide* a letter dated 4 June 2014 in accordance with s. 18(4)(a) of the HP Act. The notice dated 4 June 2014 stated clearly that if the public auction scheduled for 20 June 2014 was unsuccessful the car would be put up for auction on various other dates as specified in the said letter, including the date of 22 August 2014 when the car was eventually sold. Therefore, there was no tenable basis for the allegation that the respondent had failed to ensure that the car be disposed of at a higher price or that the respondent had in any way been involved in manipulating the sale price to the detriment of the appellant. (paras 16 & 20)

(5) The appellant did not provide evidence of manifest error to challenge the accuracy of the certificate of indebtedness. It is trite law that the certificate provides conclusive evidence of the liability of the appellant and the amount of indebtedness. The certificate thus has the effect of shifting the burden to the appellant to disprove the amount claimed. The appellant had failed to discharge this burden. (paras 23 & 25)

(6) The contention of non-receipt of the HP agreement and relevant statutory notices by the appellant was short on substance and unsupported by evidence. The respondent had shown proper service by

way of registered post. Clause 13 of the HP agreement operates to deem that the HP agreement and other notices were received by the appellant 48 hours after time of posting. Further, showing proof of posting was sufficient to rely on presumption of service. In any event, the appellant did not show evidence of non-delivery of the registered letter. Accordingly, the appellant's assertion on the non-signing and non-receipt of the HP agreement and other notices were entirely not sustainable. (paras 27-29 & 32)

(7) The argument that the appellant did not get the notice of the vesting of the HP agreement and the hire purchase facility from EON Bank Bhd to Hong Leong Bank Bhd was lacking in merit in view of the clear language of s. 50(3) of the former Banking and Financial Institutions Act 1989, which was in force at the time of the vesting of all assets and liabilities of the former to the latter, and which stipulated that such transfer to be effective on the transfer date referred to in the order of the High Court notwithstanding any law or rule of law. The vesting order was all encompassing. The absence of notification to the customers did not affect the effectiveness of the transfer. As such, the appellant's complaint about not having been informed about the vesting was of no relevance. (paras 33 & 34)

(8) The contention of the appellant questioning the validity of the affidavit was not tenable. The deponent, being a manager of the respondent, had clearly averred in his affidavit in support of the O. 14 application that the facts stated therein were based on personal knowledge, and particularly relevant to the O. 14 application, the documents and records of the respondent to which the deponent, as its manager, had unrestricted access. Therefore, the respondent had met the preliminary requirements in an O. 14 application. The assertions and denials by the appellant were inconsistent with the undisputed contemporaneous documents, and did not amount to triable issues or constitute any reasonable defence. The Sessions Court was thus correct in having granted summary judgment for the respondent. (paras 38 & 39)

Case(s) referred to:

Allianz General Insurance Malaysia Bhd v. Navis Shim Lee Hiong [2003] 8 CLJ 22 HC ***(dist)***

Am Investment Bank Bhd v. NEP Holdings (Malaysia) Bhd [2013] 1 LNS 348 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(foll)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(foll)***

Hong Leong Finance Bhd v. Lee Cheng Heng T/A Lee Cheng Heng Earthworks & Anor [1986] 1 LNS 177 ***(dist)***

HSBC Bank (M) Bhd v. Wui Ling Timber (Bintulu) Sdn Bhd & Anor [2000] 8 CLJ 197 HC ***(refd)***

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***

MBf Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(foll)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***
OCBC Bank (Malaysia) Bhd & Anor v. Sin Lee Meng Farm Sdn Bhd & Ors [2002] 7 CLJ 433 HC ***(foll)***
Phileo Allied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***
Siaw Kim Seong v. Siew Swee Yin & Anor [2008] 5 CLJ 441 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(foll)***

Legislation referred to:
Banking and Financial Institutions Act 1989 (since repealed), s. 50(3), (4)
Courts of Judicature Act 1964, s. 29
Evidence Act 1950, s. 73(1)
Financial Services Act 2013, s. 104(2)
Hire-Purchase (Application of Permit and Procedure of Repossession) Regulations 2011, reg. 15
Hire-Purchase Act 1967, ss. 5, 16(3), 16A, 18(2), (4)(a), Fourth Schedule, Fifth Schedule
Rules of Court 2012, O. 14 r. 2(2)

For the plaintiff - Shamini P; M/s CH So & Shamini
For the defendant - Rozanita Badrun; M/s Thomas Ong Leong & Assocs

[Editor's note: Appeal from Sessions Court; Civil Suit No: A52NCC-4115-12-2014]

Reported by Sandra Gabriel

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This was an appeal against the decision of the Sessions Court dated 31 July 2015 granting summary judgment in favour of the respondent (the plaintiff at the Sessions Court) for its claim for the payment of an outstanding sum of RM150,307.56 from the appellant. I have dismissed the appeal on 10 March 2016. This judgment contains the full reasons for my decision.

Key Background Facts

[2] Pursuant to a hire purchase agreement entered into by the respondent and the appellant dated 24 June 2009 ("the HP agreement"), the appellant (the defendant in the court below) agreed to hire one Mercedes Benz S350L-V221 (A) with a registration number of WSH 3131 ("the car") at a hire purchase price of RM764,025 payable by 107 instalments of RM6,019 monthly, which commenced on 24 July 2009, with the last instalment being RM5,992.

[3] As the appellant defaulted in making payments, the respondent first sent a notice of intention to repossess the car under the Fourth Schedule to the Hire Purchase Act 1967 ("the HP Act") dated 24 April 2014, and subsequently issued another notice dated 10 May 2014 pursuant to reg. 15 of the Hire-Purchase (Application of Permit and Procedure of Repossession) Regulations 2011.

[4] The appellant then however voluntarily returned the car to the respondent on 6 May 2014, as a result of which the respondent on the following day of 7 May 2014 issued the requisite notice under the Fifth Schedule of the HP Act which provided the respondent's estimate of the value of the car and the amount that would need to be paid by the appellant to make up for the shortfall and the sum payable should the appellant wish to have the HP agreement reinstated. The car was eventually sold by public auction on 22 August 2014 at a sale price of RM141,000.

[5] Given the failure of the appellant to make payment of the outstanding sum of RM150,307.56 owed to and subsequently demanded by the respondent after taking account the proceeds of the sale of the car, the respondent filed the writ action at the Sessions Court which allowed the summary judgment application by the respondent. Hence this appeal by the appellant.

Summary Of Contentions By Appellant

[6] The appellant raised a number of grounds to support his appeal, as documented in his written submissions. These included the allegation that the appellant was not served with or notified of the order dated 17 June 2011 vesting all assets and liabilities of EON Bank Berhad inclusive of the HP agreement to the respondent, and that the HP agreement itself was not given to the appellant. It was also contended that the respondent failed to comply with s. 16 of the HP Act and the notices said to have been issued were thus not valid. The appellant further asserted that the respondent did not furnish the estimate value of the car upon its return to and recovery by the respondent. The principal argument relied on by the appellant in the appeal however, which was also the focus of the hearing of the appeal before me is that the respondent had failed to ensure that the best sale price of the car was achieved and had instead manipulated the situation by delaying the sale of the same, then eventually effected at a lower and cheaper consideration, without the knowledge of the appellant, thereby causing loss to the appellant.

Nature Of Appellate Function

[7] These same grounds as outlined in the written submissions of the appellant had also substantially already been considered at the Sessions Court, as shown in the grounds of judgment of the learned Sessions Court Judge who did not find any of them raising a triable issue, which thus resulted in a summary judgment in favour of the respondent.

[8] I shall discuss each of the issues put forward by parties, where relevant, set out their respective arguments, evaluate them and state my findings. In so doing, I am also mindful of s. 29 of the Courts of Judicature Act 1964 which provides for all civil appeals to be done by way of a rehearing and of the authorities that an appellate court should be slow to interfere with the findings of the trial court, noting that the decision being appealed against in the instant case concerns a summary judgment and not as a result of a trial proceeding.

Evaluation And Findings By This Court

Issue 1 – Failure Of Respondent To Sell The Car At Higher Price

[9] The appellant mainly argued that the car should have been sold at a higher price for being a S350 Japanese specification model, as it commanded a value higher than an equivalent of UK specification. The car was in excellent condition when returned to the respondent, complete with accessories such as spoilers, sports rims and four new tires worth at least RM12,000, cassette player, woofer box as well as amplifier. The car was immediately examined by a representative of G-Mart Corporation Sdn Bhd ("G-Mart"), for the respondent upon its return. The appellant significantly highlighted that the Fifth Schedule Notice issued by the respondent itself stated RM198,400 to be the estimate value of the car, far exceeding the sale price of only RM141,000. The appellant was also able to produce newspaper cuttings from the Star Search advertisement pages of The STAR on the market value of cars said to be comparable to the car on five specific dates selected by the appellant over a period between May 2014 and August 2014, just prior to the auction sale. These advertisements showed that the lowest price quoted on those dates was RM199,800 on 3 June 2014, and the highest at RM240,000 on 22 August 2014 being the very date of the actual sale of the car.

[10] The appellant further doubted the veracity of the inspection and valuation of vehicle form No. 131078 issued by G-Mart exhibited to the affidavit of a representative of the respondent (CKH-12) as it was claimed not to reflect the true conditions of the car which could have been tampered with, and in any event the said form did not bear the signature of the appellant. In essence, the appellant contended there clearly is a dispute between the parties on the true valuation of the car that would justify witnesses be called in a full trial.

[11] In my assessment however, although the Fifth Schedule Notice dated 7 May 2014 estimated the market value of the car to be RM198,400, I do not find the lower actual sale price of RM141,000 to be in any way improper or unreasonable. The sale was done at a public auction where demand is generally not strong and prices usually falling in subsequent auctions. The car was finally sold on 22 August 2014, more than three months after its return, after several, and to be specific, nine attempts. The estimate in the Fifth

Schedule Notice is quite plainly what it is: just an estimate. Further, despite the appellant producing newspaper cuttings which generally showing prices higher than the sale price, any sale, more so in an auction must necessarily be dependent on individual cases, for each car has its own unique set of exterior and interior conditions, not to mention its age, which in the case of the car, was already more than five years at the time of the auction after the execution of the agreement. The comparability of the cars identified by the appellant and the relevance of the dates chosen by the appellant to highlight such prices too cannot be construed as definitive.

[12] In addition, the respondent (*via* G-Mart) had also performed the requisite inspection and valuation on the very day the car was returned and one day before the issuance of the Fifth Schedule Notice and as evidenced in the inspection and valuation of vehicle form No. 131078 in exh. CKH-12, which had taken into account the various aspects such as scratches and dents which even though resulted in the estimate of RM198,400, must also have influenced the eventual sale price. Allegations of vehicle tampering in my evaluation are without substance. A careful review of the form would readily reveal that other than references to a number of scratches here and there, a majority of items in the interior and exterior sections of the car as well as in the engine compartment and boot were noted as "yes/good". The overall appearance of the car however was rated as "fair".

[13] Thus I am of the view that the approach taken in the decision of the High Court in the case of *OCBC Bank (Malaysia) Bhd & Anor v. Sin Lee Meng Farm Sdn Bhd & Ors* [2002] 7 CLJ 433; [2002] 6 MLJ 257 would be similarly applicable to the instant case (*albeit* not similarly in respect of a hired vehicle) since it recognises that factors such as the physical condition of the goods being hired, period of hire and market demand would influence the resale value of the same. I agree with the respondent's position that the cases cited by the appellant namely *Hong Leong Finance Bhd v. Lee Cheng Heng T/A Lee Cheng Heng Earthworks & Anor* [1986] 1 LNS 177 and *Allianz General Insurance Malaysia Bhd v. Navis Shim Lee Hiong* [2003] 8 CLJ 22 do not assist the appellant. In my view this is primarily because the former involves non-compliance with ss. 16(3) and 18(2) of the HP Act including the fact that no proper notice as to the estimated value of the vehicle was given to the defendant hirer, unlike the situation in the instant case. In respect of the latter, although summary judgment was refused, the case concerns, unlike presently, the specific issue of insurance liability, which in any event if at all actually supported the respondent in providing emphasis on market value at the relevant time because although the sum insured in that case was RM120,000, the claim following theft of a car was allowed only at RM93,000 being the market value of the car at the material time, in accordance with a clause in the insurance policy which states that the maximum liability for loss would be "the market value of your vehicle at the time of the loss or the sum insured in the policy whichever is the lower figure".

[14] I therefore do not find the allegation of the appellant that the inspection was not properly conducted and that there were no defects at the time the car was surrendered, to be substantiated by evidence. The averment that the car was complete with accessories such as spoilers, cassette player, woofer box as well as amplifier, and that it also came with four new tires worth at least RM12,000 is thus merely bare assertions devoid of substance. The submission of the respondent that the appellant could have conveniently made this assertion only after seeing the evaluation by G-Mart as noted in the form itself which showed these specific four items as "no/fail" – in other words an afterthought – is thus in my view cannot be dismissed.

[15] Neither is the contention that the form in CKH-12 not signed by the appellant as acknowledgment to be of any merit. This is because that form has nothing to do with the appellant. It is a document containing an inspection and valuation report performed by G-Mart for the respondent. This is not a repossession form that would require the signature of the hirer. The car was returned, not repossessed, and in any event, this CKH-12 form evidences inspection and valuation, not on the fact of the return of the car *per se*. This same form then resulted in the issuance of the Fifth Schedule Notice the day after informing the appellant of the estimate value of the car.

[16] Further, the allegation that the appellant was kept in the dark about the intended auctions too is untenable, for the respondent had produced evidence to show that the Fifth Schedule Notice was sent on 7 May 2014 by registered post (exh. CKH-6) pursuant to s. 16(3) of the HP Act and the notice informing of the auction sale was sent *vide* a letter dated 4 June 2014 (exh. CKH-7) in accordance with s. 18(4)(a) of the same Act. It is observed that the notice dated 4 June 2014 stated clearly that if the public auction scheduled for 20 June 2014 was unsuccessful (and indeed it was not, as it turned out), the car would be put up for auction on various other dates as specified in the said letter, including the date of 22 August 2014 when the car was eventually sold.

[17] The appellant continued to argue even in his written submissions in reply that the inspection and valuation form is of doubtful veracity as it was dated 27 September 2014 which clearly was after the auction sale of the car on 22 August 2014. This contention would certainly be a valid one, but only if it was true. The fact of the matter is, the form clearly shows that the "repo date", as well as the acknowledgement by G-Mart to be on 6 May 2014. The date of 27 September 2014 is the expiry date of the road tax for the car instead. All this is obvious from even a most cursory glance of the form.

[18] At this stage I should add that although not raised as an issue, even though the car was technically voluntarily returned by the appellant and not repossessed by the respondent exercising its power of taking possession of the same, the issuance of the Fifth Schedule Notice was proper given the absence of express provisions in the HP Act specifically governing voluntary return of the hired vehicles other than s. 16A which states that goods which are

returned by hirers after service of the Fourth Schedule Notice (intention to repossess) shall not be liable to costs related to repossession. Other than s. 16A, provisions on consequences of repossession are in any event no different for voluntary return. Thus, the options stated in the Fifth Schedule Notice are capable of being equally applicable to situations where cars are returned as well as being repossessed, for even in common language expressed in general terms, a voluntary return of a car to the owner results in the repossession of the same by the owner. The respondent too had clarified the position by amending the pleading from "tarik balik" to "diserah".

[19] Indeed, the contemporaneous nature of the form in CKH-12 itself, having been completed on the day of the return of the car is also of significance, and the important observation of Chang Ming Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, expressed as follows is most instructive:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ... (emphasis added)

[20] Accordingly, I find no tenable basis for the allegation that the respondent had failed to ensure that the car be disposed of at a higher price or that the respondent had in any way been involved in manipulating the sale price to the detriment of the appellant.

Issue 2 – The Respondent's Demand Is Invalid And Particulars Of Amount Claimed Denied By Appellant

[21] This suit is essentially one of claim for outstanding indebtedness. But the appellant chose to focus its resistance to the action not so much on disputing the indebtedness, if at all. But he did contend that the respondent had in its statement of claim failed to particularise the various charges imposed and the details on interests, including the type of interest and period of chargeability. A review of the statement of claim will readily show that the respondent has set out the details of the calculation which produce the outstanding sum as at 2 December 2014 of RM150,307.56 which is the amount claimed, after making the requisite deductions especially on payments earlier made, sale proceeds of the auction sale as well as rebate. The additions were merely late penalty interest of RM6,463.71, auction fee

of RM200, "caj pelbagai" of RM32 and "lain-lain caj" of RM11.90. There were clearly no charges related to repossession, in line with s. 16A referred to earlier. As for the late penalty interest, that is surely to be expected as indeed it had been stipulated in the HP agreement pertaining to the period of delay or non-payment of instalment which was until that date of 2 December 2014; but is certainly continuing. The claim is also consistently reflected in the certificate of indebtedness as per exh. CKH-10.

[22] More importantly however, it is imperative that cl. 12 as contained in the HP agreement be highlighted, which provides simply as follows:

> 12. Evidence of Statement
>
> A certificate signed by your authorised officer stating the amount owning by me hereunder at the date set out in such certificate shall be *prima facie* evidence of that fact.

[23] In the instant case, the appellant did not provide evidence of manifest error to challenge the accuracy of the certificate of indebtedness issued pursuant at cl. 12 of the relevant hire purchase agreement. It is trite law that the certificate provides conclusive evidence of the liability of the appellant and the amount of indebtedness. This has been established by the former Federal Court in *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282 and can be clearly seen from the following passage from the judgment of Raja Azlan Shah CJ (Malaya) (as His Highness then was) which also concerns a summary judgment application:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the assistant registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC O 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

[24] This was followed in a later Federal Court decision in *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544; [2006] 2 MLJ 685 which also pronounced the nature and effect of such certificates, as held by Steve Shim CJ (Sabah and Sarawak) as follows:

> (3) A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim (see para 11).
>
> (4) There was nothing to indicate or suggest any manifest error on the face of the said certificate nor was any fraud shown. In the circumstances and given the authorities cited, the answer to the first question must be in the affirmative whereas the second question had to be answered in the negative (see para 13).

[25] The law has established the conclusive nature and extent of certificate of indebtedness. The certificate in cl. 12 thus has the effect of shifting the burden to the appellant to disprove the amount claimed. This, it is clear as day the appellant has failed to discharge. Mere denial, as attempted by the appellant is manifestly insufficient. Nor would the allegation that the car ought to have been sold at a higher price, even if established (which is not, as discussed above) constitute an adequately detailed riposte to the conclusiveness of the certificate.

Issue 3 – The Agreement Was Not Delivered To The Appellant Who Was Also Not Served With Other Pertinent Notices

[26] I find this contention of non-receipt of the HP agreement and other notices by the appellant to be short on substance and unsupported by evidence. Clause 13 of the HP agreement (exh. CKH-1) is of relevance and it states as follows:

> I agree that any Notice or other documents including a Summons or Writ of Summons and statement of claim or any documents or papers connected therewith in respect of any action in connection with this agreement shall be validly served on me personally or sent to me by prepaid registered post or left at my address stated overleaf or to my current business or the last address known to you **and if sent by post shall be conclusively deemed to have been received by me after the expiry of forty eight (48) hours after the time of posting notwithstanding the same may be returned undelivered**. (emphasis added)

[27] Exhibit CKH-2 shows that the HP agreement (dated 24 June 2009) was sent to the appellant by letter from the respondent dated 25 June 2009 by registered post. This was thus sent within 14 days from the date of the HP agreement, in adherence to s. 5 of the HP Act. The appellant too pleaded in his defence that he was a hirer to the respondent and it cannot be denied that his conduct subsequent to the signing, when payments of instalments were regular, was then entirely consistent with the obligation of a hirer under a contractual arrangement of a nature not dissimilar to the HP agreement.

[28] Nor do I find the contention that the relevant statutory notices were not served on the appellant to be tenable. The respondent has shown proper service by way of registered post pursuant to cl. 13 and in any event most directly to the point, the appellant himself responded to the same by returning the car to the respondent as per his letter dated 6 May 2014 in exhibit CKH-5 aptly titled "voluntary return" to avoid it being repossessed instead. The correctness of the delivery address too cannot be denied.

[29] In any event cl. 13 operates to deem that the HP agreement and other notices were received by the appellant 48 hours after time of posting. In the case of *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175, James Foong JCA for the Court of Appeal held that proof of sending prepaid AR registered is sufficient and said as follows in respect of service or writ of summons by AR registered post:

[20] In this instance, the plaintiffs had elected to serve the writ and statement of claim on this defendant by way of sending it by prepaid A.R. registered post. This defendant did not challenge that such process was never undertaken. Once this process was carried out, it is our view that there is no provision in law to say that the plaintiffs must also prove that the person so named in the post had received it. This opinion is shared by Suriyadi Halim J (as he then was) when he said in *Pengkalan Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326:

> In fact under sub-r. 1(1) of O. 10, nothing is indicated that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it ie, if it was sent by prepaid AR registered post. I therefore was satisfied that as in this case, if all the prerequisites were fulfilled, as the plaintiff had done so, the recipient being "Yanti" (not the name of the defendants) did not vitiate that service.

[30] Additionally, although not that the appellant is pleading forgery, a comparison by this court under s. 73(1) of the Evidence Act 1950 of the signature of the appellant on documents which existence are not disputed by the appellant such as the letter from the appellant himself returning the car dated 6 May 2014 in CKH-5, and as against the signature said to be that of the appellant's in the HP agreement in question, would readily conclude that these signatures are indeed similar (see a similar approach as prescribed by the Court of Appeal in *Siaw Kim Seong v. Siew Swee Yin & Anor* [2008] 5 CLJ 441; [2008] 5 AMR 97).

[31] It has also been ruled by the High Court in *MBf Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 that if delivery is by post, showing proof of posting is sufficient to rely on presumption of service. Further, in any event, the appellant did not show evidence of non-delivery of the registered letter. In the case of *HSBC Bank (M) Bhd v. Wui Ling Timber (Bintulu) Sdn Bhd & Anor* [2000] 8 CLJ 197 the High Court stated thus:

> Letter of demand was sent by registered post to an agreed address of the 1st respondent and deemed under cl. 21 to have been received by the 1st respondent. It is not enough for the 1st respondent to merely say they have not received it but they must go further to procure a letter from the postal authority to state that such a registered letter was not posted or delivered to the said address.

[32] Accordingly, the appellant's assertion on the non-signing and non-receipt of the HP agreement and other notices are entirely not sustainable.

Issue 4 – Vesting Order Not Served On Appellant

[33] The argument that the appellant did not get the notice of the vesting of the HP agreement and the hire purchase facility from EON Bank Bhd to Hong Leong Bank Bhd is similarly lacking in merit in view of the clear language of s. 50(3) of the former Banking and Financial Institutions Act 1989 which was in force at the time of the vesting of all assets and liabilities of the former to the latter, and which stipulated that such transfer to be

effective on the transfer date referred to in the order of the High Court notwithstanding any law or rule of law. The vesting order is all encompassing (see *Phileo Allied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 and the Court of Appeal decision in *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131). The entirety of s. 50(3) is reproduced below:

> (3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and **from the transfer date**, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, **and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law**, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, **or had no notice of the proceedings under this section or of other related proceedings**. (emphasis added)

[34] As such the appellant's complaint about not having been informed about the vesting is of no relevance, for the law made it manifest that the vesting took effect nevertheless. For otherwise, financial institutions would have to enter into a novation in respect of each and every loans and business agreement. As stated in the section, the absence of notification to the customers too does not affect the effectiveness of the transfer, although obviously it would make practical sense if this was done. In fact, although not raised by the respondent, pursuant to s. 50(4), the vesting order must be published in two daily newspapers; one in the national language and the other in English. Although BAFIA has been repealed, similarly worded vesting provisions are enacted in s. 104(2) of the Financial Services Act 2013. In any event, in the instant case, the various statutory notices sent under the HP Act had clearly demonstrated Hong Leong Bank Bhd as the new owner of the car under the HP Act which would be deemed by BAFIA in light of the vesting order, to have been entered into by Hong Leong Bank Bhd from the time it was actually so executed by the original financier owner and the appellant. As such, this contention of the appellant too is devoid of merit.

Issue 5 – The Affidavit In Support Of The Summary Judgment Application Is Defective

[35] The appellant contends that the affidavit affirmed by Chin Kar Hooi on behalf of the respondent is defective because it does not state the sources and grounds of the statements of information and beliefs deposed therein, in breach of O. 14 r. 2(2) of the Rules of Court 2012 ("the RC 2012"). It is useful to reproduce the pertinent parts of O. 14 as follows:

> 1. Application by plaintiff for summary judgment (O. 14 r. 1)
>
> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an

appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

...

2. Manner in which application under rule 1 shall be made (O. 14 r. 2)

(1) An application under rule 1 must be supported by an affidavit in Form 13 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of damages claimed.

(2) **Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof**.

(3) The notice of application, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant within fourteen days from the date of receipt of the sealed notice of application by the applicant.

(4) Order 32, rule 13(2) shall apply *mutatis mutandis* to all affidavits in respect of an application under this rule.

3. Judgment for plaintiff (O. 14 r. 3)

(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. (emphasis added)

[36] In particular, the appellant listed out, amongst the key ones, the following averments by the deponent:

(i) that the agreement had been served on the appellant by a letter sent *via* registered post from the respondent dated 25 June 2009 does not identify the source of the information or the person who had advised the deponent that the HP agreement had been so delivered;

(ii) that the car had been auctioned off according to procedures and the respondent had taken all requisite steps to ensure it be sold at the appropriate price is similarly unaccompanied by reference to the source of such a statement; and

(iii) that the reserve price or estimate value for the car had been arrived at after the inspection and valuation of the same taking into account the conditions of the car including number of years in use too does not mention the source in G-Mart who was the party who undertook the inspection.

[37] The appellant thus argued that the said failure to state the source of the statements or to identify the persons who advised the deponent on the averment by the deponent constitutes non-compliance with O. 14 r. 2, and thus did not meet the preliminary requirements that must be satisfied by the respondent as the plaintiff to justify summary judgment. This was indeed made clear by case law authorities, such as in particular in the case of *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283, where George Seah FJ, delivering the judgment of the former Federal Court had this to say, reiterating at the same time the aspects on evidential burden of parties in a summary judgment application:

> We think it appropriate to remind ourselves once again that in every application under O. 14 the first considerations are (a) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) **the affidavit in support of the application must comply with the requirements of r. 2 of the O. 14**.
>
> It is to be observed that a case is not within O. 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O. 14 as coming within r. 1(2); (c) where the affidavit in support of the application is defective, e.g. in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government [O. 73 r. 5(1)].
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. *If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him [see O. 14 r. 3 and 4(1)]*. (emphasis added)

[38] The contention of the appellant questioning the validity of the affidavit is not tenable. The said deponent being a manager of the respondent had clearly averred in para. 2 of his affidavit in support of the O. 14 application that the facts stated therein are based on personal knowledge, and particularly relevant to the O. 14 application, the documents and records of the respondent to which the deponent, quite expectedly as its manager, had unrestricted access. In reference to the specific averments identified by the

appellant as set out above, on the issue of service of agreement, there is clear documentary evidence in the form of the letter from the respondent in CKH-2 as I have alluded to earlier, and matters pertaining to steps taken to ensure a proper auction and how the reserve price was arrived at have already been dealt with in this judgment, namely that they are well supported by the self-explanatory documents evidenced in the inspection and valuation form in CKH-12 and the Fifth Schedule Notice in CKH-6. These documents as duly exhibited in the affidavit affirmed by the deponent in support of the summary judgment application of the respondent in my view more than sufficiently constitute and identify the requisite sources and grounds of the relevant averments, and these are clearly based on the documentary records of the respondent, which the deponent, given his position as the manager, justifiably has unrestricted access. This situation can be readily distinguished from the cases cited by the appellant where the all-important documentary or other support was plainly absent to help show source of belief. For instance, in the case of *Am Investment Bank Bhd v. NEP Holdings (Malaysia) Bhd* [2013] 1 LNS 348, an averment on the existence of an alleged oral agreement varying a fee arrangement between parties was ruled to be inadmissible since the deponent was not himself personally involved in its formation, did not identify the director or officer in the deponent's company who made the oral agreement, and merely stated that the facts were based on company records and advice from lawyers without more. This situation is plainly different from that in the instant case, where the averments are supported by exhibited documents.

Conclusion

[39] In the final analysis, considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, I am of the firm view that the respondent had clearly met the preliminary requirements in an O. 14 application in accordance with the principles established by National Company for Foreign Trade, and further, applying the leading Supreme Court case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, I thus conclude that the assertions and denials by the appellant are largely, if not overwhelmingly, inconsistent with what I deem to be primarily undisputed contemporaneous documents, and do not amount to triable issues or constitute any reasonable defence. The Sessions Court was therefore correct in having granted summary judgment for the respondent.

[40] Accordingly, in summary, in view of the foregoing reasons, it is my judgment that the respondent had indeed proven its case on a balance of probabilities to justify the granting of a summary judgment by the Sessions Court. I therefore affirm the decision of the Sessions Court and dismiss this appeal, with costs.